



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 12 February 2010**

**5442/10**

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**"I/A" ITEM NOTE**

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from : Working Party on Information  
to : Coreper (part 2)/Council

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No. prev. doc.: 5441/10

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Subject : Public access to documents  
- Confirmatory application made by Mr Petter ERICSON (No 02/c/01/10)

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Delegations will find enclosed a draft reply from the Council to confirmatory application made by Mr Petter ERICSON (No 02/c/01/10), as it stands after examination by the Working Party on Information at its meeting on 12 February 2010.

The Permanent Representatives Committee is accordingly asked to suggest that the Council, at its next meeting, record its agreement to the draft reply annexed to this document as an "A" item.

The Annex is available in English only.

**DRAFT**  
**REPLY ADOPTED BY THE COUNCIL ON .....**  
**TO CONFIRMATORY APPLICATION No 02/c/01/10**  
**made by e-mail on 14 January 2010,**  
**pursuant to Article 7(2) of Regulation (EC) No 1049/2001,**  
**for public access to document 16178/09 (RESTREINT UE)**

The Council has considered this confirmatory application under Regulation (EC) No 1049/2001 (OJ L 145 of 31.5.2001, p. 43) and Annex II to the Council's Rules of Procedure (Council Decision 2009/937/EU, Official Journal L 325, 11.12.2009, p. 35) and has come to the following conclusion:

1. The applicant refers to document 16178/09 (RESTREINT UE), which comprises draft EU comments to the US proposal on the part of the Anti-counterfeiting Trade Agreement (ACTA) concerning special requirements related to the enforcement of intellectual property rights in the digital environment.
2. In its reply dated 22 December 2009, the General Secretariat refused public access to this document pursuant to the third indent of Article 4(1)(a) (protection of the public interest with regard to international relations) and to the first subparagraph of Article 4(3) (protection of the decision making process of the Council) of Regulation (EC) No 1049/2001.
3. In his confirmatory application dated 14 January 2010, the applicant argues that the ACTA negotiations will result in "*legislation in all but name*". The applicant therefore claims that there is overriding public interest in disclosing documents on ACTA.
4. The Council has examined the above-mentioned document in the light of the applicant's arguments while taking the following elements into consideration:

5. On 20 November 2007, the Commission submitted a Recommendation to the Council to authorise the Commission to open negotiations of a plurilateral Anti-counterfeiting Trade Agreement, in other words to join the ACTA negotiating process. A revised version of the Recommendation was submitted to the Council by the Commission on 29 February 2008 and adopted by the Council on 14 April 2008. Formal negotiations with the other ACTA partners were launched in June 2008. The EU's objective with ACTA partners is to conclude a new plurilateral treaty improving global standards for the enforcement of intellectual property rights (IPR), to more effectively combat trade in counterfeit and pirated goods.
6. The negotiations are still ongoing and there is, at this stage, no agreed text. So far, seven rounds of negotiations have taken place, the latest one in Mexico in January 2010. The next meeting will be hosted by New Zealand in April 2010. In Mexico, the participants reaffirmed their commitment to continue their work with the aim of concluding the agreement as soon as possible in 2010.
7. Document 16178/09 contains detailed information on the EU's comments on a proposal made by the US, one of the negotiating partners, in the framework of the negotiations on ACTA. The Council considers that, given the sensitive content of the document, its full release to the public would seriously undermine the protection of the public interest as regards the EU's international relations. Disclosure would negatively affect the climate of confidence in the on-going negotiations. Moreover, if the EU's negotiating partners had reason to believe that their positions expressed during confidential negotiations could be made public unilaterally by the EU side, it would also have an adverse effect in future negotiations.
8. In those conditions, full public access to document 16178/09 is denied pursuant to Article 4(1)(a), third indent, of the Regulation (protection of the public interest as regards international relations).
9. It is recalled that the legislator balanced the principle of the transparency of the institutions' decision-making when it laid down the general principles and limits on the right of public access to documents in Regulation (EC) No 1049/2001. In this regard, it is recalled that the

exceptions provided for in Article 4(1)(a) of the Regulation, including the protection of public interest as regards international relations, are mandatory. In consequence, once it is established that the requested document falls within the sphere of international relations and that the protection of the invoked interest would be impaired if the document were to be disclosed, the institution must refuse public access. Article 4(1)(a) of the Regulation does not allow the institution to balance the protected interest against other interests, such as those invoked by the applicant.

10. As regards the applicant's argument relating to the legislative or quasi-legislative nature of the requested document, the Council would like to point out that the negotiation of international agreements does not fall under the institution's legislative activities under the Treaties.
11. The Council has also examined, pursuant to Article 4(6) of the Regulation, the possibility of granting partial access to the document and decided that partial access may be given to page 1 of the document which is not covered by the above-mentioned exception. A partially declassified version of document 16178/09 is set out in document 16178/09 EXT 1.

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